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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

BOB HALLAM et al., Plaintiffs, Cross-defendants, and Respondents, v. TERRY JOHNSON et al., Defendants, Cross-complainants, and Appellants, MATTHEW BUTLER, Objector and Appellant.	D054852 (Super. Ct. No. 37-2007-00066841-CU-CD-CTL)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed in part; reversed in part.

I.

INTRODUCTION

In October 2004, Bob Hallam (Bob), and his wife, Linda Hallam (Linda) (collectively the Hallams), hired defendant Haddenn Construction and several other related Haddenn entities (collectively Haddenn) and Haddenn's owner, Terry Johnson (Terry), to construct a single family residence (the Project). The Hallams terminated Terry Johnson and Haddenn in 2007. The Hallams later sued Haddenn, Terry, and his wife, Attorney Maria Johnson (Maria), among others. In their complaint, the Hallams brought various claims against Haddenn and Terry based on alleged construction defects related to the Project. The Hallams also brought several claims against Maria, including conversion and legal malpractice, based on their claim that Maria had represented the Hallams in connection with the Project. Terry and Maria subsequently filed a cross-complaint against the Hallams.[1]

The Hallams' counsel took the depositions of Terry and Maria. During these depositions, Attorney Matthew Butler, counsel for the Johnsons and Haddenn, instructed Terry and Maria not to answer numerous questions on the ground that the questions sought information that was protected by the attorney-client privilege,[2] and/or the marital

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1 The record on appeal does not contain a copy of the operative complaint or cross-complaint. Accordingly, we are unable to precisely describe the identities of the parties and the nature of their claims. We have attempted to provide an accurate procedural summary based on other documents contained in the record.

privilege. Attorney Butler raised more than 300 additional objections on a number of other grounds, unrelated to any assertion of privilege. The Hallams filed a motion to compel the Johnsons to answer the questions to which Attorney Butler had raised privilege objections, and to impose monetary sanctions on the Johnsons and Attorney Butler.

A discovery referee recommended that the trial court grant the motion to compel, and also recommended that the court impose $35,607.03 in monetary sanctions against Attorney Butler and the Johnsons, including $11,907.03 for costs incurred in taking Terry and Maria's depositions, $10,000 for costs to be incurred in the taking of future depositions, $10,500 in attorney fees related to the prior depositions, and $3,200 for the referee's time in preparing the recommendation.[3] The trial court adopted the discovery referee's recommendation in all material respects, including the imposition of monetary sanctions.

In this interlocutory appeal, the Johnsons and Attorney Butler (collectively appellants) claim that the trial court abused its discretion in granting the Hallams' motion

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2 Although Terry testified during his deposition that Maria had represented Haddenn Construction as an attorney, Maria testified in her deposition that she had never represented Haddenn Construction as an attorney.

3 With respect to the referee's time, the recommendation is unclear as to whether the referee was suggesting that the court order the Johnsons and Attorney Butler to pay $3,200, or $4,000. However, it appears that the referee intended to recommend the $3,200 figure as the operative amount, and we have therefore selected this amount. In addition, although the referee's itemized list of recommended sanctions totaled $35,607.03, the referee miscalculated the total amount of sanctions to be imposed. We adopt the $35,607.03 figure as reflecting the total amount of sanctions.

to compel, and that the court erred both in imposing monetary sanctions and in determining the amount of sanctions. We conclude that this court may not review the trial court's order insofar as the order compels discovery, for several reasons. An order compelling discovery is not directly appealable. Further, we conclude that the trial court did not base its imposition of sanctions on the assertions of privilege at issue in the motion to compel. Thus, we may not review the trial court's order granting the Hallams' motion to compel as an order that "involves the merits or necessarily affects" the court's order imposing sanctions on the appellants. (Code of Civ. Proc., § 906.)[4] We also decline to exercise our authority to consider the appellants' appeal of the order compelling discovery as a petition for a writ of mandate, for the reasons set forth in part III.A, *post*. With respect to the award of monetary sanctions, we conclude that we must reverse the trial court's order insofar as it awards monetary sanctions related to the anticipated costs of future depositions. In all other respects, we affirm the sanction award.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In August 2008, the Hallams filed an "Amended notice of motion and motion to compel further answers to depositions of defendants Terry and Maria Johnson; and for

4 Unless otherwise specified all subsequent statutory references are to the Code of Civil Procedure.

sanctions against defendants and their attorney."[5] In their accompanying memorandum, the Hallams claimed that Attorney Butler had engaged in numerous discovery abuses during Terry's and Maria's depositions, including posing improper objections as to the form of questions asked, improperly attempting to limit the scope of the depositions, improperly demanding offers of proof as to particular lines of questioning, posing an excessive number of "nuisance-value" objections in order to impede the flow of questioning, "coaching" the witnesses, and providing "speaking" objections, thereby unnecessarily delaying the questioning. In a separate section of their memorandum, the Hallams noted that Terry and Maria had refused to answer various questions at their depositions, based on Attorney Butler's assertion of the marital privilege and/or attorney-client privilege. The Hallams requested that the court grant their motion to compel the answers to these questions and order that the Johnsons submit to additional depositions.

The Hallams claimed that they were entitled to sanctions based on Attorney Butler's misuse of the discovery process during the Johnsons' depositions, pursuant to section 2030.010 and section 2023.030, subdivision (a). The Hallams also claimed that they were entitled to sanctions pursuant to section 2025.480, subdivision (f), to the extent that they prevailed on their motion to compel.

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[5] Neither the original notice of motion to compel and for sanctions nor the memorandum in support thereof is contained in the record. However, the record contains a proof of service page indicating that the Hallams filed an original notice of motion on July 2008.

The Hallams supported their motion with a separate statement of disputed matters that included a section entitled "Discovery abuses," and a separate section entitled "Improper assertions of privileges . . . ." In the section concerning discovery abuses, the Hallams included excerpts from the deposition transcripts that were grouped into categories of claimed abuses, including inappropriate objections regarding the form of the questions, inappropriate coaching of the witnesses, inappropriate delay tactics, inappropriate demands for offers of proof, and inappropriate instructions to witnesses not to answer questions. The Hallams also claimed that Attorney Butler attempted to disrupt the flow of the questioning by raising an excessive number of objections, noting that he had raised more than 300 objections solely as to form. The Hallams' counsel provided a declaration detailing the attorney fees that his firm had billed in connection with the Johnsons' depositions.

The Johnsons and Haddenn filed an opposition to the motion to compel and the motion for sanctions, and an opposing separate statement, and the Hallams filed a reply. The referee held a hearing on the motion to compel and motion for sanctions.[6] After the hearing, the Hallams' counsel filed a supplemental declaration in which he requested sanctions totaling $112,243, including $69,336.50 in attorney fees. In his declaration, the Hallams' counsel stated that he was seeking fees both in connection with Attorney Butler's conduct at the Johnsons' depositions, as well as in connection with the Hallams' motion to compel and motion for sanctions. The Johnsons and Haddenn filed a request

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6 There is no transcript of this hearing in the record.

that the referee rule on numerous specific evidentiary objections, and deny the Hallams' motion to compel. The Hallams filed an additional response in which they reduced their request for monetary sanctions to $100,307.53, explaining that their counsel had inadvertently included attorney fees for which they were not seeking reimbursement in the most recent declaration.

The referee issued a recommendation on the Hallams' motion to compel and motion for sanctions. In the recommendation, the referee described the scope of the motion to compel and motion for sanctions as follows:

> "The instant motion arises primarily from the invocation of attorney client and marital privilege by defendants Terry and Maria Johnson. However, a separate and equally important grounds for the motion, is plaintiffs' assertion that defense counsel's conduct at the depositions violated the provisions of [section 2023.010, subdivisions (b) and (c)] . . . ."

In the "Discussion" section of the recommendation, the referee included a subsection entitled, "Violation of [section 2023.010, subdivisions (b) and (c)]," and a separate subsection entitled, "Privilege." In the subsection concerning violation of section 2023.010, the referee stated:

> "By statute, objections at a deposition are limited to objections as to form and claims of privilege which are waived if not invoked.
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> "In their opposition papers and oral argument, defendants note that objections as to form are not only proper, but an attorney is obligated to make them. In addition, counsel argues that [the Hallams' counsel's] complaint to the numerous form objections should be overlooked, because the witnesses answered the questions after the objections as to form were interposed.
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> "The referee has no quarrel with the law or counsel's obligation to competently represent his clients. Nonetheless, the fact that an

> attorney is obligated to interpose objections as to form does not relieve him of his obligation to make valid objections in good faith. Herein, the referee reluctantly concludes that the bulk of form objections articulated by counsel were not valid, were disruptive and excessive. In addition, counsel frequently spoke objections, thereby inferentially coaching the witness. As plaintiffs note in their separate statement . . . defense counsel asserted over 300 form objections. The referee concludes this conduct was disruptive and excessive. (See [] §§ 2023.010, 2025.460 and Weil and Brown, Cal. Practice Guide, Civ. Proc. Before Trial (The Rutter Group 2001) ¶ 8:719-8:722, pp. 8E-109-110)."

In the section concerning the Johnsons' privilege objections and the Hallams' motion to compel, the referee stated that he was not making a recommendation as to whether the attorney-client and/or marital privileges applied in this case, but that the Hallams' counsel should be allowed to ask foundational questions to determine the potential applicability or inapplicability of the privileges.

In a section entitled "Conclusion and recommendations," the referee stated in relevant part:

> "1. Rulings on Objections
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> "Attached hereto and incorporated by reference are the referee's proposed rulings on 85 pages of objections and the reasons for granting plaintiffs' motion to compel on the vast majority of questions. In essence, the referee concludes that the invocation of attorney/client and marital privileges were improper and precluded plaintiffs' counsel [from] eliciting virtually any useful information to which he was entitled. In addition, defense counsels' [*sic*] objections as to form were excessive and in most instances not well taken. These objections contravene the provisions of [section 2023.010, subdivisions (b) and (c)] and caused unwanted annoyance, oppression and undue burden and expense.

"2. Sanctions

"[Hallams' counsel] has requested $112,243.53 in sanctions. While the referee feels this amount is excessive, he nonetheless feels substantial sanctions are appropriate. The depositions in question consumed over 30 hours of time and are of little or no value in light of the objections interposed. The referee recommends that sanctions in the amount of $36,407.03 be imposed."[7]

The Johnsons filed an objection to the referee's recommendation. In their objection, the Johnsons claimed that the referee erred in compelling them to answer additional questions, despite their assertions of the marital privilege and the attorney-client privilege. The Johnsons also filed an ex parte application in which they requested that the trial court hold a de novo hearing on the motion to compel and motion for sanctions. In their application, the Johnsons claimed that the sanctions award was unjust. In support of this argument, the Johnsons contended that Attorney Butler had acted with substantial justification in instructing the witnesses not to answer various questions on the ground of privilege. The Johnsons also contended that the amount of the sanctions award was excessive. In support of this contention, the Johnsons noted that in his supplemental declaration, the Hallams' counsel had greatly increased the amount of sanctions sought, that the Hallams sought to "avoid incurring any costs or fees with the past or future depositions," and that the prior depositions contained significant amounts of unobstructed testimony.

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[7] The referee provided an itemized list of recommended monetary sanctions, as described in part I., *ante*. Although at this point in the recommendation, the referee referred to $36,407.03 as the total amount of sanctions, we conclude that the referee intended to recommend the imposition of $35,607.03 in sanctions. (See fn. 3, *ante*.)

The Hallams filed a response to the Johnsons' objection and ex parte application. Among other contentions, the Hallams argued that the Johnsons were incorrect in contending that the referee's sanction recommendation was based on Attorney Butler's privilege objections, arguing, "A simple reading of both Plaintiffs' supporting papers and the final Recommendation readily demonstrates that the sanctions were requested and awarded based on numerous abuses of discovery by Mr. Butler, whose conduct and excessive objections on grounds *other than privilege* were inappropriate."

On January 16, 2009, the trial court issued an order that stated that the court had reviewed the referee's recommendation and found it to be "rational and reasonable." The trial court made a few modifications to the referee's evidentiary rulings, and then indicated that it would sign the recommendation. The court also stated, "In addition to the above ruling, the court finds the imposition of sanctions reasonable and not excessive." The court denied the Johnsons' request for a de novo hearing.

The appellants timely appeal from the January 16 order.

III.

DISCUSSION

A. *The issues on appeal*

Appellants claim that the trial court abused its discretion in granting the Hallams' motion to compel. Appellants also claim that the trial court erred in imposing sanctions, and that the amount of sanctions that the trial court awarded is excessive. For the reasons stated below, we may not review the appellants' claim that the trial court erred in granting respondents' motion to compel in this appeal.

An order compelling discovery is not an appealable order. (See *Roden v. AmerisourceBergen Corp.* (2005) 130 Cal.App.4th 211, 215.) An appeal may be taken from "an order directing payment of monetary sanctions by a party or an attorney for a party if the amount exceeds five thousand dollars ($5,000)." (§ 904.1, subd. (a)(12); *Rail-Transport Employees Assn. v. Union Pacific Motor Freight* (1996) 46 Cal.App.4th 469, 475.) Pursuant to section 906, "Upon an appeal pursuant to Section 904.1. . ., the reviewing court may review . . . any intermediate . . . order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party . . . ."

Applying this law, we conclude that this court has jurisdiction to consider appellants' appeal from the trial court's order awarding the Hallams $35,607.03 in sanctions. However, we lack jurisdiction to consider appellants' appeal from the trial court's order granting the Hallams' motion to compel. In part III.B.2. *post*, we conclude that we may affirm the trial court's order directing the payment of sanctions based on Attorney Butler's conduct at Johnsons' deposition. Because the sanctions award was based on conduct other than that at issue in the motion to compel, we do not review the trial court's order granting the motion to compel as an order affecting the order granting sanctions pursuant to section 906.

While this appeal was pending, the Johnsons filed a petition for writ of mandate in which they sought review of the trial court's order granting the motion to compel, as well as the imposition of sanctions. In their writ petition, the Johnsons claimed that because the trial court had imposed sanctions for their assertion of the attorney-client and marital

privileges, this court would "inevitably have to decide the issues raised" in their petition in an eventual appeal. This court denied the petition on the ground that the Johnsons had an adequate remedy by way of appeal. (*Johnson v. Superior Court* (July 8, 2009, D054849) [nonpub. order].) However, for the reasons stated in part III.B.2, *post*, we now conclude that, contrary to the Johnsons' representation in their writ petition, the trial court's sanction order was *not* based on Attorney Butler's assertions of privilege at issue in the motion to compel. Therefore, we may not review the trial court's order granting the Hallams' motion to compel as an order that "involves the merits or necessarily affects" the court's order imposing sanctions on the appellants. (§ 906.)

In light of our suggestion in our order denying the Johnsons' writ petition that the Johnsons might be able to gain review of their motion to compel by way of an appeal, we have considered whether to consider this appeal as a petition for writ of mandate. (*San Joaquin County Dept. of Child Support Services v. Winn* (2008)[163 Cal.App.4th 296, 300 [Court of Appeal has power to treat appeal as a writ petition "but . . . 'should not exercise that power except under unusual circumstances.' [Citation.]"].) We decline to exercise this authority for the following reasons.

In addition to erroneously characterizing the basis for the sanction award in their writ petition, the Johnsons' writ petition was defective in that neither the Hallams' motion to compel nor briefing in support of the motion was included in the exhibits submitted in support of the petition. Further, although these documents are contained in the record in this appeal, and the Johnsons stated in their March 30, 2009 petition for writ of mandate that they would "soon move to consolidate the appeal" with the writ proceeding, no such

motion has been filed. If such a motion to consolidate had been filed and granted, this court would have had the opportunity to consider the merits of the appeal and the petition for writ of mandate contemporaneously.

In light of the Johnsons' erroneous characterization in their writ petition as to the basis for the sanctions order, their failure to provide an adequate record to support their writ petition, and their failure to move have the writ petition considered with, or consolidated with, this appeal, we decline to consider the present appeal as a petition for writ of mandate as to the motion to compel.

B. *The trial court did not err in determining that the Hallams were entitled to monetary sanctions*

1. *None of the appellants' procedural arguments have merit*

The appellants offer several procedural grounds on which they claim the trial court's sanctions award must be reversed. Each of these contentions raises a question of law, which we review de novo. (E.g., *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 800-801.)

First, appellants contend that the trial court lacked statutory authority to support its imposition of sanctions. The trial court concluded that Attorney Butler's conduct in defending the Johnsons' depositions violated section 2023.010, subdivisions (b) and (c).

Section 2023.010 provides in relevant part:

> "Misuses of the discovery process include, but are not limited to, the following:
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> [¶] . . . [¶]

> "(b) Using a discovery method in a manner that does not comply with its specified procedures.
>
> "(c) Employing a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense."

Section 2023.030 provides in relevant part:

> "To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, the court, after notice to any affected party, person, or attorney, and after opportunity for hearing, may impose the following sanctions against anyone engaging in conduct that is a misuse of the discovery process:
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> "(a) The court may impose a monetary sanction ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses, including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. If a monetary sanction is authorized by any provision of this title, the court shall impose that sanction unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Appellants maintain that "it was the Hallams' counsel, and not the Johnsons, [who] "us[ed]' or 'employ[ed]' a 'discovery method.' " Appellants cite no authority for their implicit contention that a person "use[s]" or "employ[s]" a "discovery method" only by making affirmative use of such procedures. The terms "using" or "employing" a discovery method are broad enough to cover the actions of counsel defending a deposition. (Cf. *Puerto v. Superior Court* (2008) 158 Cal.App.4th 1242, 1248 [stating that party providing "supplemental discovery response would likely merit sanctions for . . . '[e]mploying a discovery method in a manner or to an extent that

causes . . . oppression, or undue burden and expense.' "].) By raising objections (see § 2025.460 [describing objections that may be raised in a deposition]) and otherwise participating in the deposition, Attorney Butler "used" or "employed" a "discovery method" within the meaning of in section 2023.010.[8]

Appellants also contend that the trial court's order imposing sanctions is invalid because the court did not specifically cite section 2023.030 in its order, and because the court did not expressly analyze the "substantial justification" exception to the imposition of sanctions contained in section 2023.030, subdivision (a). We conclude that the trial court's order is not subject to reversal on these grounds. (See *Ghanooni v. Super Shuttle* (1993) 20 Cal.App.4th 256, 261 [concluding that court's "order imposing sanctions was not defective for failing to specify with particularity the basis for awarding sanctions," because "[u]nlike other statutes authorizing sanctions . . . the discovery statutes do not require the court's order to 'recite in detail' the circumstances justifying the award"].)

Finally, citing section 2025.480, subdivision (b), appellants claim that the order granting sanctions must be reversed insofar as it was based on Attorney Butler's actions during Terry's first deposition, because the Hallams' motion to compel was allegedly untimely as to that deposition. Section 2025.480, subdivision (b) provides that a motion to compel further answers from a deponent "shall be made no later than 60 days after the completion of the record of the deposition . . . ." Section 2025.480, subdivision (f)

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8 The appellants do not claim that the trial court erred in imposing sanctions against the Johnsons and Attorney Butler jointly and severally, rather than imposing sanctions solely against Attorney Butler.

provides, "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

Appellants' claim of untimeliness fails for two reasons. First, for the reasons stated in part B.2. *post*, the order granting sanctions in this case was not based on the Johnsons' unsuccessful opposition to the motion to compel pursuant to section 2025.480, subdivision (f). (See *London v. Dri-Honing Corp.* (2004) 117 Cal.App.4th 999, 1007 ["a motion for discovery monetary sanctions may be filed separately from a motion to compel"].) Thus, the time limit for filing a motion to compel did not apply to the Hallams' motion for sanctions. (See *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152 [granting a motion for monetary discovery sanctions unrelated to a motion to compel after jury's verdict].) Further, even assuming that the trial court did impose sanctions based on the Johnsons' unsuccessful opposition to a motion to compel pursuant to section 2025.480, subdivision (f), "a motion for discovery monetary sanctions may be made after an underlying motion to compel . . . is litigated." (*London v. Dri-Honing Corp., supra,* 117 Cal.App.4th at p. 1001.)

2. *The trial court did not abuse its discretion in awarding sanctions based on Attorney Butler's conduct at the Johnsons' depositions that was unrelated to his assertion of privilege objections*

Appellants claim that the trial court erred in determining that the Hallams were entitled to monetary sanctions. Appellants' primary claim on appeal is that the trial court

erred in awarding sanctions based on their opposition to the Hallams' motion to compel and Attorney Butler's conduct in asserting various attorney-client and marital privilege objections during Johnsons' depositions. Appellants also claim that the trial court erred in determining that Attorney Butler's conduct at Johnsons' depositions—unrelated to his assertion of privilege objections—warranted the imposition of sanctions.

We conclude that the trial court's award of sanctions was primarily, if not entirely, based on Attorney Butler's conduct at the depositions, unrelated to his assertion of privilege objections, and that appellants have not demonstrated that the court abused its discretion in determining that such conduct warranted the imposition of sanctions.

a. *Governing law and standard of review*

Section 2023.010 provides a list of "misuses of the discovery process," including "[u]sing a discovery method in a manner that does not comply with its specified procedures," and "[e]mploying a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, or oppression, or undue burden and expense." (§ 2023.010, subds. (b), (c).) Section 2023.030 provides that the trial court may impose various sanctions upon "anyone engaging in conduct that is a misuse of the discovery process."

Section 2025.460 describes the objections that may be made at a deposition, in relevant part, as follows:

> "(a) The protection of information from discovery on the ground that it is privileged . . . is waived unless a specific objection to its disclosure is timely made during the deposition.

> "(b) Errors and irregularities of any kind occurring at the oral examination that might be cured if promptly presented are waived unless a specific objection to them is timely made during the deposition. These errors and irregularities include, but are not limited to, those relating to the manner of taking the deposition, to the oath or affirmation administered, to the conduct of a party, attorney, deponent, or deposition officer, or to the form of any question or answer. Unless the objecting party demands that the taking of the deposition be suspended to permit a motion for a protective order under Sections 2025.420 and 2025.470, the deposition shall proceed subject to the objection.
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> "(c) Objections to the competency of the deponent, or to the relevancy, materiality, or admissibility at trial of the testimony or of the materials produced are unnecessary and are not waived by failure to make them before or during the deposition."

Section 2025.480, subdivision (a) provides in relevant part, "If a deponent fails to answer any question . . . ., the party seeking discovery may move the court for an order compelling that answer. . . ." Section 2025.480, subdivision (f) provides, "The court shall impose a monetary sanction under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel an answer or production, unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust."

"A trial court has broad discretion when imposing a discovery sanction. Accordingly, the trial court's order will not be reversed on appeal in the absence of a manifest abuse of discretion that exceeds the bounds of reason . . . ." (*Lee v. Lee* (2009) 175 Cal.App.4th 1553, 1559.) The appellant bears the burden on appeal of demonstrating

that the trial court abused its discretion in imposing a discovery sanction. (*Young v. Rosenthal* (1989) 212 Cal.App.3d 96, 114-115.)

b. *Application*

We first consider the appellants' primary claim on appeal, namely, that the trial court erred in awarding sanctions based on the Johnsons' opposition to the Hallams' motion to compel and Attorney Butler's conduct in asserting various objections based on the attorney-client privilege and marital privilege, during the Johnsons' depositions. As noted above, pursuant to section 2025.480, subdivision (f), a trial court is authorized to impose sanctions based on a party's unsuccessful opposition to a motion to compel. In their moving papers, the Hallams cited section 2025.480, subdivision (f), along with section 2023.010, subdivision (b) and (c), as support for their request for sanctions. In his recommendation, the referee cited 2023.010, subdivision (b) and (c) and the misuses of the discovery process defined in section, and made no express or implied reference to section 2025.480, subdivision (f).

Although the referee stated that the motion to compel and the motion for sanctions arose from the appellants' invocation of the marital privilege and attorney-client privilege, the referee also stated that "defense counsel's conduct at the depositions violated the provisions of [section 2023.010, subdivision (b) and (c)" and constituted "*separate and equally important grounds* for the motion." (Italics added.) In discussing Attorney Butler's conduct, the referee referred solely to conduct unrelated to the assertion of privilege objections. For example, the referee noted that an attorney is obligated to pose objections as to form "in good faith," and that "the bulk of form objections

articulated by counsel were not valid, were disruptive and excessive." The referee further found that "counsel frequently spoke objections, thereby inferentially coaching the witness," and that the defense counsel's assertion of over 300 form objections was "disruptive and excessive." None of this conduct was related to the assertion of privilege objections.

Finally, at no place in his recommendation did the referee state that he was recommending the imposition of sanctions based on Attorney Butler's assertion of privilege objections, or the Johnsons' unsuccessful opposition to the Hallams' motion to compel. Accordingly, we conclude that the trial court's imposition of sanctions was not based on either Attorney Butler's assertion of privilege objections or the Johnsons' unsuccessful opposition to the Hallams' motion to compel.

Appellants also claim that the trial court erred in determining that Attorney Butler's conduct—unrelated to his assertion of privilege objections—warranted the imposition of sanctions. However, none of appellants' arguments demonstrate that the court abused its discretion in adopting the referee's recommendation that their counsel's conduct warranted monetary sanctions. First, appellants broadly assert that Attorney Butler's objections were "necessary" in light of opposing counsel's harassing and

embarrassing questions, and his refusal to meet and confer on the record.[9] However, appellants fail to support this assertion with any examples of such "necessary" objections, much less demonstrate that such objections constituted a meaningful portion of the more than 300 objections that Attorney Butler raised during the depositions. Nor have appellants demonstrated that the Hallams' counsel's refusals to meet and confer "on the record" justified any of Attorney Butler's conduct that the referee describes in his recommendation.

Second, appellants claim that opposing counsel failed "almost completely" to ask questions that were likely to lead to the discovery of admissible evidence. This court's determination of whether the Hallams' counsel's questions were reasonably likely to produce admissible evidence is effectively precluded by the failure of the appellants to include the operative complaint and cross-complaint in the record on appeal. In addition, the examples of deposition questions that appellants cite in their brief as not reasonably likely to lead to admissible evidence—including questions concerning the physical location of potentially discoverable documents, Terry's familiarity with e-mail, and Maria's familiarity with worker's compensation insurance—all appear to meet the broad test of relevancy for discovery purposes, as far as we can determine, given the absence in the record of the operative complaint and cross-complaint. (See *Stewart v. Colonial*

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9 To the extent that the appellants believed that opposing counsel was harassing the witnesses, their remedy was to suspend the deposition and seek a protective order. (§ 2025.470.) They did not pursue this remedy, which, if unsuccessful, could also have led to the imposition of sanctions. (§ 2025.420, subd. (d) [authorizing the imposition of monetary sanctions against a party who unsuccessfully makes a motion for a protective order].)

Western Agency, Inc. (2001) 87 Cal.App.4th 1006, 1013 [" 'For discovery purposes, information is relevant if it 'might reasonably assist a party in *evaluating* the case, *preparing* for trial, or *facilitating* settlement . . . .' [Citation.] Admissibility is *not* the test and information unless privileged, is discoverable if it might reasonably *lead* to admissible evidence. [Citation.] These rules are applied liberally in favor of discovery [citation], and (contrary to popular belief), fishing expeditions *are* permissible in some cases.' [Citation.]"].)

Third, appellants claim that the Hallams' counsel asked questions that exceeded the "agreed-upon scope" of the deposition. The record indicates that counsel for the parties disagreed as to whether there was an agreement to limit the scope of the depositions. The appellants have not demonstrated that the trial court abused its discretion in determining that Attorney Butler's attempts to restrict deposition questioning were not justified by any purported agreement to limit the scope of the depositions.

Appellants also fail to demonstrate on appeal that the trial court abused its discretion in adopting the referee's conclusion that Attorney Butler made an excessive number of form objections that were invalid and disruptive, that he frequently engaged in speaking objections throughout the depositions, and that he improperly coached the witnesses. Accordingly, we conclude that appellants have failed to demonstrate that the trial court abused its discretion in determining that Attorney Butler's conduct during the Johnson's depositions warranted the imposition of sanctions.

C. *The trial court erred in awarding sanctions to cover the costs of both future and past depositions, but did not otherwise err in determining the amount of sanctions*

Appellants raise three contentions pertaining to the dollar amount of the sanctions that the trial court awarded. Appellants contend that the trial court lacked statutory authority to impose sanctions for costs associated with depositions to be taken in the future. In addition, appellants claim that section 2023.040 precludes a trial court from considering a declaration other than one accompanying the original motion for sanctions, in determining the amount of sanctions to be imposed. We review these contentions de novo. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1479 ["To the extent that we are called upon to interpret the statutes relied on by the trial court to impose sanctions, we apply a de novo standard of review"].) Appellants also claim that the amount of sanctions imposed was excessive because, contrary to the referee's finding, the depositions were not "of little or no value." We apply the abuse of discretion standard of review to this contention. (*Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 1001.)

Appellants claim that the trial court was without statutory authority to impose sanctions for future costs, and that the court's award provided the Hallams with a double recovery. We agree. Section 2023.030 authorizes a court to order that a person who has engaged in the misuse of the discovery process "pay the reasonable expenses . . . *incurred* by anyone as a result of that conduct." (Italics added.) Only the expenses of the depositions that had already been conducted can be said to have been "incurred." By ordering the appellants to pay the costs of *both* the past and future depositions, the trial

court's order effectively provided the Hallams with cost-free depositions. This is not a proper use of discovery sanctions. (See *Williams v. Russ* (2008) 167 Cal.App.4th 1215, 1223 [discovery sanctions "should not put the moving party in a better position than he would otherwise have been had he obtained the requested discovery"].) Accordingly, we reverse the portion of the trial court's sanction award that awards costs associated with the taking of future depositions.

Second, appellants claim that the trial court erred in considering the Hallams' counsel's supplemental declaration, in which he sought additional monetary sanctions above those sought in the original declaration that was filed with the Hallams' notice of motion for sanctions. The appellants claim that, "[b]y considering something *other than* the declaration accompanying the original motion, the court failed to provide the statutory notice and opportunity to be heard required by the Civil Discovery Act [(§ 2016.010 et seq.)]."

Section 2023.040 provides, "A request for a sanction shall, in the notice of motion, identify every person, party, and attorney against whom the sanction is sought, and specify the type of sanction sought. The notice of motion shall be supported by a memorandum of points and authorities, and accompanied by a declaration setting forth facts supporting the amount of any monetary sanction sought."

The Hallams' counsel complied with section 2023.040 by filing a declaration with the original notice of motion for sanctions in which he set forth the amount of monetary sanctions sought. In his original declaration, Hallams' counsel indicated that the Hallams were seeking sanctions of up to $36,000, which is more than the $35,607.03 that the court

eventually imposed. In any event, there is nothing in section 2023.040, or any other statute cited by appellants, that would preclude the filing of a supplemental declaration in support of a motion for sanctions. Accordingly, we conclude that the trial court did not violate section 2030.040 in considering the Hallams' motion for sanctions and their supporting declarations, including counsels' supplemental declarations.

Finally, appellants provide a statistical analysis of the deposition transcripts in an attempt to demonstrate that "significant blocks of deposition transcript went forward with little if any interjection by the Johnsons' counsel." Appellants claim that this statistical analysis demonstrates that Attorney Butler's objections and explanations account for 3,416 of the 22,657 lines in the deposition transcripts.[10] Appellants claim that this analysis demonstrates that the referee erred in concluding that the depositions were " 'of little or no value,' " and by "sanctioning Mr. Butler based on 100% of the depositions." We are not persuaded. The referee undoubtedly intended his comments to indicate that Attorney Butler's improper conduct significantly disrupted the taking of the Johnsons' depositions. Appellants have not demonstrated that the trial court abused its discretion in adopting this conclusion. In awarding attorney fees for such misconduct, the referee and the trial court were not required to precisely match the attorney fee award to the percentage of the deposition transcript containing objections from Attorney Butler. We

10 We assume for purposes of this opinion that appellants are correct in this regard.

conclude that the trial court did not abuse its discretion in awarding attorney fees for the 30 hours that it took to complete the depositions at issue.[11]

IV.

DISPOSITION

The January 16, 2009 order is reversed insofar as it awards monetary sanctions in the amount of $10,000 for costs related to the taking of future depositions. The January 16 order is affirmed insofar at it awards $25,607.03 in monetary sanctions. Each party is to bear its own costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

McDONALD, J.

11 Fees were awarded only for the time counsel billed for conducting the Johnsons' depositions, not for fees related to counsel's preparation for the depositions or for other proceedings related to the motion to compel and motion for sanctions.